

2013 ERISA Advisory Council Locating Missing and Lost Participants

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Description of Issue:

Plan sponsors, services providers, plan advisers and other parties (Plan Representatives) face challenges assuring that plan benefits are paid to plan participants and their beneficiaries in a timely manner. Plan Representatives consistently struggle with how to accomplish the delivery of benefits when the plan participant or beneficiary is either “lost” or “missing” (Lost Participants). In some cases, such Plan Representatives are fiduciaries subject to ERISA’s fiduciary duty provisions. In other cases, the Plan Representatives act in a non-fiduciary capacity on behalf of and at the direction of plan fiduciaries. In every case, the Plan Representatives need to consider the importance of getting Plan benefits to the participants and beneficiaries. The focus of this topic is how to connect Lost Participants with their benefits.

While the Department of Labor (DOL) has issued guidance intended to address the lost and missing participant issue, Plan Representatives continue to be unclear on key issues involving compliance with their fiduciary responsibilities under ERISA and the proper accounting for plan benefits and assets in relation to Lost Participants. Plan Representatives could benefit from more clarity on several issues, including: (i) the “plan asset” status of plan benefits attributable to Lost Participants; (ii) the fiduciary requirements governing the thoroughness of a search and the subsequent handling of benefits attributable to Lost Participants; (iii) the application of state abandoned property or escheatment statutes as a mechanism to dispose of the benefits of Lost Participants; (iv) the treatment of small benefits of Lost Participants; and (v) the reporting and disclosure obligations. A theme that underlies all of these legal questions is how ERISA’s fiduciary obligations differ among plan types (defined benefit retirement, defined contribution retirement, and health and welfare) and the status of the plan as active, frozen (including frozen legacy pension plans), or terminated.

Plan Representatives, including their accountants, also regularly face accounting issues involving Lost Participants. These include (i) how to account for amounts due Lost Participants or held by a third party administrator to pay claims to Lost Participants in employee benefit plans and (ii) the treatment of retirement plans that are intended to be treated as terminated but the final distribution of assets is not possible due to Lost Participants.

Finally, Plan Representatives address the Lost Participants issue in a variety of different ways. We expect that many of those approaches, but not all, are permissible under ERISA. However, Plan Representatives may not be aware that there could be better alternatives in the marketplace to find Lost Participants. For example, there are numerous free and fee-based search alternatives available some of which are more effective than others. As such, Plan Representatives are in need of a repository of information from which they can draw on the experience of others. This may be particularly true for certain Plan Representatives serving plans in the small employer marketplace.

Objective and Scope:

The Council is examining this topic and intends to draft recommendations to the Secretary of Labor for consideration. Our study will focus on:

- A. Identification of current industry practices with regard to the handling of Lost Participants, including but not limited to methods of searching for Lost Participants (such as use of locator services, federal government programs and resources, internet search engines, and other publicly available electronic media) and procedures for updating addresses and advising participants to maintain current address information with the plan administrator;
- B. The fiduciary obligations surrounding the location of Lost Participants, the use of plan assets to pay for locating Lost Participants, and the handling of plan benefits attributable to Lost Participants that cannot be located after appropriate search efforts;
- C. How are plans applying state abandoned property and escheatment laws to benefits of Lost Participants, what is the current state of the federal law in this regard, and what clarification, if any, is needed;
- D. When does a distributed benefit cease to be a “plan asset;”
- E. The benefit accounting issues involving Lost Participants; and
- F. Clear guidance on efforts to deal with small benefit amounts;
- G. Identification of obligations or practices that may be helpful in reducing the number of Lost Participants, including identification of points of contact between a plan and participants once the participants leave the employer.